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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1564

SOUTH PARK SQUARE, LIMITED,
Petitioner,

vs.

CITY OF JACKSON, MISSISSIPPI and STATE HIGHWAY DEPARTMENT OF THE STATE OF MISSISSIPPI,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

BRIEF OF RESPONDENT, CITY OF JACKSON, MISSISSIPPI, IN OPPOSITION

JOHN E. STONE, City Attorney
City of Jackson, Mississippi
220 South President Street
Post Office Box 17
Jackson, Mississippi 39205
Telephone: (601) 354-2941
Attorney for Respondent, City of Jackson, Mississippi

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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OPINION BELOW

The Court of Appeals for the Fifth Circuit rendered an opinion in this cause on December 27, 1977, and the Motion for a rehearing en banc was overruled on February 2, 1978, all as shown in Appendix A and B in Petitioner's Petition for Writ of Certiorari, *South Park Square, Ltd.* v. *City of Jackson, Mississippi*, 565 F.2d 338, motion for rehearing en banc denied 568 F.2d 1367.

JURISDICTION

The position of Respondent has always been that the Complainant-Petitioner did not state a cause over which the Federal Courts had jurisdiction.

QUESTIONS PRESENTED

1. Whether or not a party has a right to invoke the jurisdiction of the Federal Courts on the question of the issuance of a building permit within a municipality when the matter has never been presented to the governing authorities of the municipality?

2. Whether or not Petitioner has the right to recover of a municipality, a monetary judgment when Petitioner refused to either request the governing authorities of the municipality for a building permit or invoke the jurisdiction of the State Courts to force the municipality to grant such a permit?

STATEMENT OF THE CASE

Petitioner secured an option to purchase certain property north of the City of Jackson, Mississippi, and located on Interstate Highway Number 55, for the purpose of building a Ramada Inn. Petitioner filed a petition for a permit for a foundation only with the Permit Department of the City of Jackson, Mississippi. This permit was denied by the Assistant City Engineer and the Head of the Permit Department. Petitioner at no time made a formal request of the governing authorities of the City for a hearing on such denial, nor did Petitioner seek a

writ of mandamus to force the City to issue a permit. Neither did the Petitioner, without benefit of permit, proceed to build its Ramada Inn, although it had available to it at all times all of the remedies hereinabove set forth.

Petitioner sat on whatever rights it had until its mortgage on the property was foreclosed and it lost all the funds it had put into the project. At no time did the Respondent occupy Petitioner's property, nor did the Respondent bring any action of any kind seeking to occupy any of the Petitioner's property.

ARGUMENT

Point I.

Respondent Has Never Denied Petitioner the Building Permit.

The governing authorities of the City of Jackson, Mississippi were never presented with an appeal from the decision of the administrative personnel denying said permit, therefore, there was never any official action of the City of Jackson, Mississippi on the matter. The City of Jackson, Mississippi is a municipality having a commission form of government composed of three (3) commissioners of equal stature, *Miss. Code Ann.* § 21-5-7 and 21-5-9 (1972). All of the business of the City must be passed on formally by these commissioners, *Delta Construction Co. of Jackson* v. *City of Pascagoula,* (Miss. 1973) 278 So.2d 436, 441.

> "The mayor and city council constitute the executive, legislative and judicial branches of the city government, all rolled up into one. Theirs is the final authority. The city attorney is their legal advisor and the city planning commission and board of zoning adjustments and appeals their advisors as to planning and zoning, but the final decision is up to the city council."

All authority for the governing of the municipality is vested in these commissioners. At no time was there an appeal from the decision of the City of Jackson Permit Department to the full commission for consideration of whether or not the permit Petitioner requested should be issued. Petitioner was bound by the administrative decision unless it appealed therefrom. The governing authorities never passed on the matter, therefore, the City of

Jackson, Mississippi as such, never denied Petitioner its permit.

Administrative employees of the City do not bind the City as such, and even the issuance of a building permit by administrative officials is subject to revocation by the City Council, *City of Jackson* v. *Kirkland,* (Miss. 1973) 276 So.2d 654; *City of Jackson* v. *Sunray DX Oil Co.,* (Miss. 1967) 197 So.2d 882; *City of Jackson* v. *Ridgway,* (Miss. 1972) 258 So.2d 439; and *Delta Construction Co. of Jackson* v. *City of Pascagoula,* (S.D. Miss. 1974) 384 F. Supp. 1052.

In view of the above decisions, Respondent's position is that the City of Jackson has never denied a building permit to the Petitioner and, therefore, no Federal question is involved in this matter since the Respondent, City of Jackson, Mississippi, has never acted thereon.

Point II.

The Granting or Denial of a Building Permit Is a Governmental Function of a Municipality.

As a general rule the issuance or non-issuance of a building permit is a governmental function for which a municipality is not answerable in damages, 9 *McQuillin, Municipal Corporations* 3d Revised, Section 26.200, page 524; *Lancaster* v. *City of Columbus,* (U.S. Dist. Ct. N.D. Miss. 1971) 333 F.Supp. 1012, 1022-1023.

Point III.

Under the Facts of This Case There Is No Substantial Federal Question Presented.

It is respectfully submitted that the Petition in this case does not come within any of the provisions provided

under Rule 19(b) of the Rules of the United States Supreme Court, and that the jurisdictional question, as the Fifth Circuit opinion stated, ". . . is wholly insubstantial and frivolous.", *South Park Square, Ltd.* v. *City of Jackson, Mississippi*, 565 F.2d 338, 343.

Point IV.

The Facts in This Case Do Not Present a Question for Federal Jurisdiction.

Regardless of any abstract principle of law, the facts of each particular case give rise to the law in that case, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 Sup.Ct. 114, 71 L.Ed. 303, 311.

The facts in this particular case are that when Petitioner approached the Permit Department of the City of Jackson the only plans filed and the only permit requested was a permit for a foundation. To begin with, Petitioner was told that there was no adequate supply of water or sewerage and that the building would violate the zoning ordinances of the City. So regardless of the questions presented by the Mississippi Highway Department, in no event would Petitioner have been entitled to a permit without further corrective action on its part. No corrective action of any kind was taken. Instead, Petitioner contented itself with pleading with the Highway Department and with informally dealing with agents of the City of Jackson, Mississippi to prevail upon the Highway Department to make a definite decision regarding the location of the proposed highway interchange in the area. At no time did Petitioner appeal from the decision of the Permit Department, nor did Petitioner resort to the remedies which it had under the laws of the State of Mississippi, which remedies were: if the City Council had affirmed

the action of the Permit Department in denying the building permit, Petitioner had a right to appeal to the Circuit Courts of the State, *Miss. Code Ann.* § 11-51-75 (1972), or if Petitioner felt that this was not a sufficient remedy, it had a right to petition for the issuance of a writ of mandamus, *Thompson* v. *Mayfield*, (Miss. 1967) 204 So.2d 878; *Berry* v. *Embrey*, (Miss. 1960) 120 So.2d 165.

It is unrealistic for a Petitioner to take the position that it had a right to invoke the jurisdiction of the Federal courts with nothing more to base that contention upon than the decision of the director of the Permit Department of the City of Jackson, Mississippi. If the jurisdiction of the Federal courts is so easily obtained, could it be that such jurisdiction could have been invoked by a mere secretary, receptionist or typist for that matter questioning a petitioner in regard to the issuance of a building permit?

As well-observed in the case of *Euclid* v. *Ambler Realty Co., supra,* 71 L.Ed. 310:

> ". . . regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained a century ago or even a half century ago probably would have been objected as arbitrary and oppressive."

See also, *Maher* v. *City of New Orleans*, (Fifth Cir. 1975) 516 F.2d 1051.

As pointed out by the opinion of the Circuit Court in this cause, this court in *Kirschke* v. *City of Houston*, 330 S.W.2d 629 (Tex. Civ. App. 1960), appeal dismissed 364 U.S. 474, 81 Sup.Ct. 242, 5 L.Ed.2d 221, dismissed an appeal in a case which was quite similar to the present case. It makes no difference so far as this case is concerned that sixteen (16) years later another Texas Court refused

to follow *Kirschke* for the reason that this Court had previously held that *Kirschke* did not present to the Court a federal question. It is the contention of the Respondent in this cause that this Court, in refusing to hear an appeal in the *Kirschke* case, has held that such a factual situation did not present a federal question for review by this Court, therefore, the Petitioner does not bring itself within the terms of Rule 19 of this Court, and the Petition for Writ of Certiorari herein should be dismissed.

Petitioner throughout its Petition continually cited the expression of the Fifth Circuit contained in the opinion of this cause, to the effect that:

> ". . . [t]his case presents a novel question of constitutional law; whether a city's denial of a building permit, ultimately resulting in the owner's loss of his property for inability to obtain financing, is a compensable taking."

Respondent respectfully submits that there is no proof that the City of Jackson, Mississippi denied the building permit. At the threshold of the case, as hereinabove set forth, Respondent denies that the governing authority of the City of Jackson, Mississippi ever took any action of any kind, and that Petitioner failed to bring this matter officially to the attention of the aforesaid governing body. Regardless of this fact, this isolated statement in the opinion of the court below certainly is not sufficient for this Court to grant the Writ of Certiorari, particularly in view of the fact that this Court dismissed on appeal the case of *Kirschke, supra.*

It abundantly appears that the Petitioner in this case was the architect of his own troubles and should be required to suffer the consequences thereof.

CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari in this cause should be denied and the decision of the Fifth Circuit Court of Appeals affirmed.

Respectfully submitted,

CITY OF JACKSON, MISSISSIPPI
By: JOHN E. STONE

CITY OF JACKSON, MISSISSIPPI
JOHN E. STONE, City Attorney
220 South President Street
P. O. Box 17
Jackson, Mississippi 39205
Telephone: 601 354-2941

PROOF OF MAILING

The undersigned counsel for Respondent, City of Jackson, Mississippi, hereby certifies that three (3) true and correct copies of the foregoing Brief of Respondent, City of Jackson, Mississippi, in Opposition, has this day been mailed by United States Mail, postage prepaid, to Alvin M. Binder, Esquire, Counsel for Petitioner, at his address of P. O. Box 25, Jackson, Mississippi 39205; and to Robert G. Nichols, Counsel for Respondent, State Highway Department of the State of Mississippi, at his address of P. O. Box 1526, Jackson, Mississippi 39205.

This, the 17th day of May, 1978.

JOHN E. STONE, City Attorney for
City of Jackson, Mississippi